82-1354

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

No. _____

N.H. NEWMAN, et al.,
Petitioners,
UNITED STATES OF AMERICA, et al.,
Amicus Curiae,
v.
STATE OF ALABAMA, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

WHETHER THE COURT OF APPEALS RENDERED A DECISION IN CONFLICT WITH DECISIONS OF THIS COURT AND OF OTHER COURTS OF APPEALS, WHEN IT RULED THAT A FEDERAL DISTRICT COURT, WHICH HAS ISSUED A REMEDIAL INJUNCTIVE ORDER TO STATE OFFICIALS TO CURE LONGSTANDING CONSTITUTIONAL VIOLATIONS, IS LIMITED TO THE USE OF CONTEMPT SANCTIONS TO ENFORCE THAT ORDER AND MAY NOT ISSUE ANY FURTHER INJUNCTIVE ORDERS TO EFFECTUATE THE ORIGINAL ORDER AND CURE THE CONSTITUTIONAL VIOLATIONS?

PARTIES

The petitioners are N.H. Newman, Jerry Lee Pugh and Worley James, the named plaintiffs in the courts below for themselves and a class of all those persons who are now or may in the future be confined as prisoners by the Alabama prison system.

The respondents are George C. Wallace, Governor of Alabama; Charles Graddick, Attorney General of Alabama; and Fred Smith, Commissioner of Corrections. Governor Wallace and Commissioner Smith were automatically substituted as parties when they assumed their respective offices on January 17, 1983. Rule 25(d), Federal Rules of Civil Procedure.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DECISIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 683 F.2d 1312 (11th Cir. 1982) and a copy is attached hereto as Appendix A. (A.1). The order of the United States District Court for the Middle District of Alabama is not reported and a copy is attached hereto as Appendix C. (A.19).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 9, 1982. An order denying a petition for rehearing was entered on October 19, 1982 and a copy of that order is attached hereto as Appendix B. (A.17). On December 29, 1982, Justice Powell extended the time for filing this petition to and in-

cluding February 14, 1983.[1] Jurisdiction is conferred by 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment VIII to the Constitution of the United States prohibiting cruel and unusual punishment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

made applicable to the states by Sections 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States Code:

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[1]That order was entered in Miscellaneous No. A-570.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

We recite only so much of the eleven year history of this litigation as is necessary for a determination of the issue presently before the Court. Beginning in 1971, the petitioners, all of whom are Alabama prison inmates, brought three separate lawsuits under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3) to redress alleged constitutional violations in the Alabama prisons. *See Newman v. Alabama,* 349 F.Supp. 278 (M.D. Ala. 1972), *aff'd,* 503 F.2d 1320 (5th Cir. 1974), *cert. den.* 421 U.S. 948 (1975); *Pugh v. Locke* and *James v. Wallace,* 406 F.Supp. 318 (M.D. Ala. 1976), *aff'd with modifications sub nom. Newman v. Alabama,* 559 F.2d 283 (5th Cir. 1977), *cert. den. in relevant part,* 438 U.S. 781 and 438 U.S. 915 (1978). On more than one occasion the district court held that conditions in the Alabama prison system, including overcrowding, violated the rights of inmates under the eighth and fourteenth amendments and ordered injunctive relief. (A.3).[2] At his request, the district court appointed former Alabama Governor Fob James receiver of the Alabama

[2]Hereafter, all references to the opinions of the courts below will be cited to the Appendix to this Petition and designated A.

prison system charged with bringing the system into conformity with the court's decrees. *Newman v. Alabama,* 466 F.Supp. 628 (M.D. Ala. 1979). (A.3).

On October 9, 1980, the district court in order to further implementation of its original orders, approved and signed a consent decree in which the respondents and the receiver (collectively, "the State") agreed to comply fully with all prior remedial orders of the court within specific deadlines. In the portion of the consent decree relevant to this petition, the State agreed and the court directed them to reduce periodically the number of state prisoners held in county jails until September 1, 1981, when none was to remain. An earlier order of the district court had placed limits on inmate population in state prisons. The State complied in part with this order by crowding state inmates into county jails, where the district court found conditions "worse than any that exist in the state prisons." *Newman v. Alabama,* 466 F.Supp. 628, 630 (M.D. Ala. 1979). Thus it became necessary for the district court to concern itself with the unconstitutional overcrowding of State inmates in county jails. (A.3, 4).

Rather than steadily decreasing as the consent decree required, the population of State inmates in county jails actually increased throughout the early months of 1981. (A.4). In an order dated July 15, 1981, the district court stated that it had given the State "every possible opportunity . . . to achieve compliance with . . . Orders of this Court within the last nine years," yet the State had been "continuously in direct violation of the Orders of this Court." The court concluded that it had "a duty to protect the constitutional rights" of Alabama prison inmates and that "the only valid substantial relief available . . . is the release of substantial number of inmates to help relieve the overcrowded condition of the Alabama Prison System."

(A.4, 5). To effectuate its earlier orders and to protect the constitutional rights of class members, the district court ordered the release of a number "of those inmates who appear to be most likely to assume positions of responsibility and trust outside of prison." (A.22).[3]

Another hearing was held in the district court on November 12, 1981, wherein it was stipulated that on that date there were 1,528 state prisoners confined in city and county jails although the order of the district court entered on October 9, 1980, directed that all state prisoners should be removed from city and county jails by September 1, 1981. (A.21). In addition, the Court of Appeals found that "as the case came before the district court on December 14, 1981, the fact of unconstitutional overcrowding of state prisoners in county jails could not be disputed." (A.11).

On December 14, 1981, the district court ordered the release on parole for the balance of their sentence of 352 prisoners from a list provided by the state officials based upon criteria acceptable to the Alabama Prison Administration. (A.23). The district court also ordered that prisoners who would be eligible for parole consideration within six months of the date of the order could be given immediate consideration by the Alabama Board of Pardons and Paroles.

The State moved the district court to stay its December 14 order and the motion was denied. Thereafter, the Court of Appeals granted the State's application for a stay pending an appeal.

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[3]An application for a stay of this order was denied by the Court of Appeals and by this Court. *Graddick v. Newman*, ____ U.S. ____, 102 S.Ct. 4 (1981).

The August 9, 1982 opinion of the Court of Appeals dismissed the appeal of the July 15, 1981 order as moot because the state officials had fully complied with that order.[4] The Court of Appeals vacated the December 14 order, holding that all of the parties and the district court were mistaken in regarding that order as a means of "enforcing" the October 9, 1980, consent decree and declaring, instead, that the December 14 order was a "distinct mandatory injunction" in which the court framed relief that was beyond the contemplation of the consent decree. (A.8).

The Court of Appeals said that the October 9, 1980 order should have been enforced by having the state officials adjudged in contempt and then having the court impose sanctions of either incarcerating the Governor and other state officials or imposing fines on them. (A.9).

The Court of Appeals went on to say that although the petitioners had adequately established a constitutional violation requiring redress, they did not carry their burden of showing the inadequacy of their legal remedy and thus

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[4]Petitioners agree with that part of the Court of Appeals' ruling and review of same is not sought by this petition.

However, the ruling of the Court of Appeals concerning the December 14 order is not moot for two reasons, even though the 352 prisoners named in that order have presumably been released by now. First, the harm to those members of the plaintiff class near the end of their prison terms who are least deserving of further incarceration and who suffer from the continuing unconstitutional overcrowding is "capable of repetition, yet evading review." *Roe v. Wade,* 410 U.S. 113, 125 (1973). Second, in these certified consolidated class actions there remains a present, live controversy concerning the power of the district court to effectuate its previous orders and cure continuing constitutional violations. *Sosna v. Iowa,* 419 U.S. 393 (1975);Franks v. Bowman Transportation Co. Inc., 424 U.S. 747 (1976). A conclusion of mootness in the instant case would forever foreclose review of the important underlying question concerning the district court's power.

were not entitled to a mandatory injunction. The "adequate" legal remedy, according to the Court of Appeals, was again a civil contempt proceeding and coercive sanctions. (A.11, 12).

The Court of Appeals denied a petition for rehearing on October 19, 1982. On December 29, 1982, Justice Powell extended the time for filing this petition to and including February 14, 1983.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

A. Conflicts with decisions of this court

This case is important for the issues it raises as to the proper allocation of functions between the federal district courts and federal courts of appeals. This Court has consistently recognized that "[t]he proper observance of the division of functions between federal trial courts and the federal appellate courts is important in every case," especially in cases where the district court has been asked to issue an effective remedy to cure unconstitutional conditions in public institutions. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 410 (1977), *Milliken v. Bradley,* 433 U.S. 267 (1977) (Milliken II) (public schools); *Hutto v. Finney,* 437 U.S. 678 (1978) (state prisons).

The opinion and order of the Court of Appeals vacating the remedial order of the district court are contrary to the general principles which this Court has enunciated governing the equitable powers of district courts to fashion remedies for constitutional violations and raise important questions about the proper function of appellate courts in reviewing remedial orders. In this case, the appellate court held that federal judges in complicated civil rights cases

may only use their power to impose contempt sanctions to obtain compliance with previously entered orders.

The general principles governing resolution of this issue are well settled by prior decisions of this Court. *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 695-96 (1979); *Hutto v. Finney,* 437 U.S. 678, 687 n.9 (1978); *Milliken v. Bradley,* 433 U.S. 267, 280-81 (1977) *(Milliken II); Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15-16 (1971). Although it mentioned *Hutto* in passing, the Court of Appeals ignored the now classic statement in *Swann* that, once invoked, "the scope of a district court's equitable powers to remedy past wrongs is broad. . . ." 402 U.S. at 15.

The principles governing the remedial powers of district courts require federal courts to focus upon three factors. First, the nature of the remedy is to be determined by the nature and scope of the constitutional violation, and the remedy must, therefore, be related to the condition alleged to offend the constitution. Second, the decree must be remedial in nature and designed as nearly as possible to restore victims to the position they would have occupied in the absence of a constitutional violation. Third, the federal courts in formulating a remedy must take into account the interests of state and local authorities in managing their own affairs consistent with the constitution. Futhermore, while state and local authorities have primary responsibility for managing their own affairs, if those authorities fail in their affirmative obligations judicial authority may be invoked. *Milliken v. Bradley,* 433 U.S. 267, 280-81 (1977) *(Milliken II).*[5]

[5]Although they were not heeded at all by the Court of Appeals in the instant case, the three *Milliken* factors have been painstakingly

District courts have always been given great leeway in fashioning effective remedies to enforce their orders and this Court has consistently approved and encouraged such flexibility. The continuing development of school desegregation cases provides an instructive look at the approved process of constantly fashioning new equitable relief in complicated cases.

In the Montgomery County, Alabama School Case, the district court originally mandated only the desegregation of certain grades and required the defendants to produce a plan for the gradual desegregation of others during the following year. *Carr v. Montgomery County Board of Education,* 232 F.Supp. 705 (M.D. Ala. 1964). When the defendants made little progress on their own in that regard, the court entered a further order in 1968, now instructing the defendants to comply with its previous orders by hiring and assigning faculty members in such a fashion that the ratio of white to black teachers in each school was substantially the same as the ratio of white to black teachers throughout the system. In order to bring that about within a reasonable time, the court set forth a fixed schedule for meeting the mathematical formula in each school. 289 F.Supp. 647, 654 (M.D. Ala. 1968).

Under the Court of Appeals' reasoning in this case, the lower court's only remedy would have been to hold the school officials in contempt. This Court, however, approved the district court order in full with Justice Black writing for the Court:

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adhered to by other courts of appeals. *See, e.g., Morgan v. O'Bryant,* 671 F.2d 23 (1st Cir. 1982); *Smith v. Sullivan,* 611 F.2d 1039 (5th Cir. 1980); *Ciudadanos Unidos de San Juan v. Hidalgo County Grand Jury Commissioners,* 622 F.2d 807 (5th Cir. 1980); *Preston v. Thompson,* 589 F.2d 300 (7th Cir. 1978); *Evans v. Buchanan,* 582 F.2d 750 (3rd Cir. 1978); *Miller v. Carson,* 563 F.2d 741 (5th Cir. 1977).

> The 1964 initial order of Judge Johnson was followed by yearly proceedings, opinions, and orders by him. . . . The record, however, also reveals that in some areas the board was not moving as rapidly as it could to fulfill this duty, and the record shows a constant effort by the judge to expedite the process of moving as rapidly as practical toward the goal of a wholly unitary system of schools, not divided by race as to either students or faculty. . . .
>
> . . . Judge Johnson noted that in 1966 he had ordered the board to begin the process of faculty desegregation in the 1966-1967 school year but that the board had not made adequate progress toward this goal. . . . He therefore concluded that a more specific order would be appropriate under all the circumstances. . . .
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> . . . [T]he record is filled with statements by Judge Johnson showing his full understanding of the fact that, as this Court also has recognized, in this field the way must always be left open for experimentation.
>
> *United States v. Montgomery County Board of Education,* 395 U.S. 225, 230-35 (1969) (footnotes omitted).

Never in the long history of the case did any court suggest that contempt was the only enforcement device available. This Court recognized that the enforcement of that injunction called for the very "experimentation" that the district court employed. The same understanding is implicit in the range of this Court's decisions superintending protracted enforcement litigation. *See, e.g., Milliken v. Bradley,* 418 U.S. 717 (1974) (reviewing 7 years of enforcement litigation below - none of it involving contempt proceedings.)

The same principle has been followed in prison conditions suits. In *Hutto v. Finney, supra,* this Court upheld the district court's finding that conditions in isolation cells in the Arkansas penal system continued to violate the eighth and fourteenth amendments. The Court also held that the district court had the authority to place a maximum limit of thirty days on confinement in isolation cells. Justice Stevens, writing for the Court, explained:

> The question before the trial court was whether past constitutional violations had been remedied. . . . We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.
>
> In fashioning a remedy, the District Court had ample authority to go beyond earlier orders and to address each element contributing to the violation. The District Court had given the Department repeated opportunities to remedy the cruel and unusual conditions in the isolation cells. If petitioners had fully complied with the court's earlier orders, the present time limit might well have been unnecessary. But taking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance.
>
> The order is supported by the interdependence of the conditions producing the violation. . . . Finally, the excercise of discretion in this case is entitled to special deference because of the trial judge's years of experience with the problem at hand and his recognition of the limits on a federal court's authority in a case of this kind.
>
> 437 U.S. at 687-88 (footnotes omitted).

In a footnote Justice Stevens further discussed the scope of a district court's equitable powers:

> As we explained in *Milliken v. Bradley*, 433 U.S. 267, 281, 97 S.Ct. 2749, 2757, 53 L.Ed.2d 745, state and local authorities have primary responsibility for curing constitutional violations. "If, however '[those] authorities fail in their affirmative obligations . . . judicial authority may be invoked.' *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 91 S.Ct. 1267, 28 L.Ed.2d 554. Once invoked, 'the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.' " *Ibid.* In this case, the District Court was not remedying the present effects of a violation in the past. It was seeking to bring an ongoing violation to an immediate halt.
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> 437 U.S. at 687 n.9

One year after its decision in *Hutto* this Court decided *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), and affirmed the power of a federal district court to issue detailed remedial orders.[6] In *Washington*, the United States, on its own behalf and as trustee for seven Indian tribes brought suit against the State of Washington in federal district court seeking an interpretation of two treaties and an injunction requiring the state to protect the Indians' share of runs of anadromous fish. The district court inter-

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[6]This Court has often commented on the remedial powers of district courts in complex litigation such as antitrust cases. *See, e.g., Ford Motor Company v. United States*, 405 U.S. 562, 573 (1972), *United States v. Glaxo Group Limited*, 410 U.S. 52, 64 (1973).

preted the treaties and issued an injunction, but the State Supreme Court later ruled that the Department of Fisheries could not comply with the federal injunction. The federal district court then entered a series of orders enabling it to assume direct supervision of the State's fisheries, and its power to take such direct action was upheld by this Court in an opinion written by Justice Stevens:

> State-law prohibition against compliance with the District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution. . . . It is also clear that Game and Fisheries, as parties to this litigation, may be ordered to prepare a set of rules that will implement the Court's interpretation of the rights of the parties even if state law withholds from them the power to do so. . . .
>
> Whether Game and Fisheries may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful. But the District Court may prescind that problem by assuming direct supervision of the fisheries if state recalcitrance or state-law barriers should be continued. It is therefore absurd to argue, as do the fishing associations, both that the state agencies may not be ordered to implement the decree and also that the District Court may not itself issue detailed remedial orders as a substitute for state supervision. The federal court unquestionably has the power to enter the various orders that state officials and private parties have chosen to ignore, and even to displace local enforcement of those orders if necessary to remedy the violations of federal law found by the court. . . .

> In short, we trust that the spirit of cooperation motivating the Attorney General's representation will be confirmed by the conduct of state officials. But if it is not, the District Court has the power to undertake the necessary remedial steps and to enlist the aid of the appropriate federal law enforcement agents in carrying out those steps. Moreover, the comments by the Court of Appeals strongly imply that it is prepared to uphold the use of stern measures to require respect for federal-court orders.
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> 443 U.S. at 695-96 (footnotes omitted).

Justice Stevens, in a footnote, quoted the comments made by the United States Court of Appeals for the Ninth Circuit concerning the use of stern measures by a district court:

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases . . ., the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice. 573 F.2d 1123, 1126 (CA9 1978).
>
> 443 U.S. at 696 n.36.

Thus, this Court in *Hutto* and *Washington* reaffirmed the broad scope of a district court's equitable powers. In both *Hutto* and *Washington* this Court declared that the district court had ample authority to go beyond its earlier

orders in the face of state recalcitrance. State officials in both cases had had the opportunity to remedy constitutional or federal law violations and had failed to do so. In such situations, often involving a long and unhappy history of litigation, the district court is justified in entering a comprehensive order or in assuming direct supervision of state agencies.

Ignoring the *Milliken* II factors the Court of Appeals in this case held that the consent decree of October 9, 1980, requiring the state to remove state prisoners from county jails, would be most effectively enforced by incarcerating the governor or fining the recalcitrant state officials. By holding that the district court's order of December 14, 1981 was not a means of enforcing the consent decree, the Court of Appeals departed from the direction taken by this Court and other courts of appeals on the questions of whether a lower court's remedial order is related to the constitutional violation and whether it is remedial in its effect.

In place of the district court's orderly and reasoned solution to the overcrowding problem, the appellate court required that the remedy of contempt be employed, a remedy which under the circumstances of this case is unnecessarily intrusive, far more so than the remedy ordered by the district court. The use of contempt power would throw the state and federal sovereigns into direct conflict, ignores political reality, and aggravates rather than reduces state and federal friction.[7] While the lack of

[7]The district court "attempted to provide every possible opportunity for the Defendants to achieve compliance with both State law and the Orders of [that] Court within the last nine years." (A.21). However, it is a fact of political life that state officials, particularly elected officials, win few friends and many detractors when they take unpopular actions, even in response to federal court orders. Il-

funds is no excuse for the violation of constitutional rights, we do recognize, as the district court recognized, that the Alabama prison system is underfinanced and that the defendants' inability to obtain additional monies from the Legislature has slowed compliance. (A.20, 21). The district court can not hasten compliance by siphoning off funds from a poorly-financed system and filling up the United States' coffers with money that should be spent on improving conditions.

The suggestion that the public officials might themselves be imprisoned is similarly impractical. The policy underlying the supposed preference for one remedial device over another surely must be, in this context at least, that the preferred remedy can bring results with reduced friction. To prefer the incarceration of a sitting governor over the December 14 order is to stand that policy on its head. The District Court had no intention of promoting a needless, embarrassing and ultimately fruitless constitutional crisis. See *United States v. Nixon,* 418 U.S. 683, 691-92 (1974). An ineffectual remedy is no remedy at all and neither firing state officials nor incarcerating them would do anything to cure the existing constitutional violations.

The decision of the appellate court, if left standing, sets a dangerous precedent which could seriously erode the principles of equitable relief established in prior decisions of this Court. A firm statement is needed by this Court to reaffirm the power and the duty of district courts to act

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lustrative of the fact that politics, rather than legal principles, form the basis of the respondents' position is that the Governor took issue with the district court's December 14, 1981 release order but acquiesced in the July 14, 1981 order. See *Graddick v. Newman, supra.* The district court understood as much and acted accordingly, accepting responsibility for some distasteful and unpopular actions, out of deference to the delicacy of the respondents' position.

with deliberate speed in providing an effective remedy in prison cases where degrading conditions subject prisoners to cruel and unusual punishment.

B. Conclusion

Certiorari should be granted because the Court of Appeals' approach to remedial orders is contrary to the decisions of this Court in *Hutto* and *Milliken* and does not respect the role of the district court in fashioning remedial orders. This case provides the proper vehicle for determining the respective roles of trial and appellate courts in determining appropriate remedial guidelines in prison conditions, as well as other, cases. The issue is presented clearly in this case since the appellate court and the district court agreed that there were serious existing constitutional violations which were not being addressed by responsible state officials.

Respectfully submitted,

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APPENDIX A
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7606

N. H. NEWMAN, et al.,
Plaintiffs-Appellees,

UNITED STATES OF AMERICA, et al.,
Amicus Curiae,

versus

STATE OF ALABAMA, et al.,
Defendants-Appellees,

CHARLES A. GRADDICK,
Attorney General, State of Alabama,
Movant-Appellant.

No. 81-8003

N. H. NEWMAN, et al.,
Plaintiffs-Appellees,

UNITED STATES OF AMERICA, et al.,
Amicus Curiae,

versus

STATE OF ALABAMA, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

(August 9, 1982)

Before MORGAN, TJOFLAT and KRAVITCH,

Circuit Judges.

TJOFLAT, Circuit Judge:

On July 15 and December 14, 1981, the district court ordered officials of the Alabama Department of Corrections to release from custody several hundred convicted state prisoners as a means of reducing unconstitutional overcrowding in the Alabama prison system. In these consolidated cases, those officials, the Attorney General of Alabama, and the Governor of Alabama, as receiver of the Alabama prison system, challenge the propriety of the district court's orders. Because the appellants have fully complied with the July 15 order, we dismiss the appeal of that order as moot. As for the December 14 order, we conclude that the record does not support its entry. We therefore vacate that order and remand this case to the district court for further proceedings.

I.

We recite only so much of the eleven year history of this litigation as is necessary to our decision. Beginning in 1971, the plaintiffs, all of whom are Alabama prison inmates, brought three separate lawsuits to redress alleged constitutional violations in the Alabama prisons. *See Newman v. Alabama,* 349 F. Supp. 278 (M.D. Ala. 1972); *Pugh v. Locke,* 406 F. Supp. 318 (M.D. Ala. 1976); *James*

v. Wallace, 406 F. Supp. 318 (M.D. Ala. 1976).[1] On more than one occasion the district court held that the conditions in the Alabama prison system, including overcrowding, violated the rights of inmates under the eighth and fourteenth amendments and ordered injunctive relief.[2] The court's actions in these cases were affirmed, with modifications, on consolidated appeal. *Newman v. Alabama,* 559 F. 2d 283 (5th Cir. 1977), *cert. denied,* 438 U.S. 915, 98 S.Ct. 3144 (1978).[3] In 1979, in an effort to expedite compliance with its orders, the district court appointed Alabama Governor Fob James receiver of the Alabama prison system, charged with bringing the system into conformity with the court's decrees. *Newman v. Alabama,* 466 F. Supp. 628 (M.D. Ala. 1979).

On October 9, 1980, the district court approved and signed a consent decree in which the defendants and the receiver (collectively, "the State") agreed to comply fully with all prior remedial orders of the court within specific deadlines. In the portion of the consent decree relevant to this appeal, the court directed the State to reduce

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[1]The defendants in these suits included the State of Alabama, the Department of Corrections, and numerous state officials in their individual and official capacities. In *Alabama v. Pugh,* 438 U.S. 781, 98 S.Ct. 3057 (1978), the Supreme Court held that the eleventh amendment barred this action against the State of Alabama and the Alabama Department of Corrections. The individual state officials who run the various state agencies involved in this case are still parties, however. In this appeal, we deal only with those defendants who are officials of the Department of Corrections, and the Attorney General.

[2]This relief included wide-ranging measures to ensure reasonably adequate food, clothing, shelter, sanitation, medical attention, and personal safety for prisoners. *Newman v. Alabama,* 559 F.2d 283, 288 (5th Cir. 1977), *cert. denied,* 438 U.S. 915, 98 S.Ct. 3144 (1978). This appeal concerns only the issue of unconstitutional overcrowding in the prison system.

[3]Thereafter, the three cases were consolidated for further proceedings in the district court.

jails until September 1, 1981, when none were to remain.[4] with the unconstitutional overcrowding of state inmates in county jails.

Rather than steadily decreasing as the consent decree required, the population of state inmates in county jails actually increased throughout the early months of 1981. The plaintiffs took no steps, however to obtain compliance with the consent decree; they did not move the district court to order the State to show cause why it should not be held in civil contempt for violating the decree. Instead, they filed a "Motion to Require the Provision of Sufficient Funds for Compliance With the October 9, 1980, [Consent] Order or the Release of Members of the Plaintiff Class Until There is Compliance." This motion asked the court to direct the State to provide funds sufficient to build new prison facilities that would alleviate the overcrowding in county jails. Alternatively, the motion requested the release from state custody of 200 prisoners a week until no state prisoners remained in county jails.

The district court held a hearing on the plaintiffs' motion at which the parties stipulated that the overcrowding of state prisoners in county jails had not abated. The plaintiffs abandoned their request for prison construction funds[5] and asked the court for immediate relief from the overcrowding. On May 20, the court ordered the Depart-

[4]An earlier order of the district court had placed limits on inmate population in state prisons. The State complied in part with this order by crowding state inmates into county jails, where the district court found conditions "worse than any that exist in the state prisons." *Newman v. Alabama*, 466 F.Supp. 628, 630 (M.D. Ala. 1979). Thus, it became necessary for the district court to concern itself with the unconstitutional overcrowding of state inmates in county jails.

[5]The record on appeal does not contain the transcript of this hearing. Subsequent orders of the district court, however, indicate that plaintiffs did not pursue their request that the court order the State to provide sufficient funds for new prison construction.

ment of Corrections to submit to the court a list of 250 prisoners "least deserving of further incarceration"; additional lists, each with the names of 250 prisoners, were to be submitted every two weeks, for a period of eight weeks.

In an order dated July 15, the district court stated that it had given the defendants "every possible opportunity . . . to achieve compliance with . . . Orders of this court within the last nine years," yet the State had been "continuously in direct violation of the Orders of this Court."[6] The court concluded that it had "a duty to protect the constitutional rights" of Alabama prison inmates and that "the only valid substantial relief available . . . is the release of a substantial number of inmates to help relieve the overcrowded condition of the Alabama Prison System." The court named 400 inmates to be released,[7] and ordered that on July 24, writs of habeas corpus issue for these prisoners;[8] it also accelerated the parole eligibili-

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[6]We note that, despite the district court's observation that the State had been in continuous violation of the court's orders, the plaintiffs had never initiated contempt proceedings against the State, the State had never been given the opportunity to show that it was not in contempt, and the court had never adjudged the State in contempt.

[7]Although the court had previously ordered the Department of Corrections to submit lists of inmates "least deserving of further incarceration," it was the district court that actually selected the prisoners to be released. The court did not disclose the criteria it used to select these inmates though there is some indication in the record that it attempted to select those who were within six months of their probable parole dates.

[8]The use of the writ of habeas corpus to effect the release of prisioners was plainly erroneous since no prisoner had applied for a habeas writ and since the constitutionality neither of prisioners' convictions nor of their sentences was at issue. We therefore treat the district court's July 15 order as an injunction mandating the release of prisoners not because of any infirmity in the judgments requiring their individual confinements, but in order to remedy unconstitutional overcrowding. Notably, the court's December 14, 1981, release order did not mention habeas corpus.

ty dates of fifty others.[9] On July 22, the court amended its July 15 order by reducing the number of inmates to be released on habeas corpus to 277.[10] On July 25, the State complied with the habeas writs and released the designated prisoners.[11]

Despite the July 25 release of 277 prisoners, the plaintiffs remained dissatisfied with the overcrowded conditions of the county jails. Again, instead of seeking to have the State held in contempt and coercive sanctions imposed for its noncompliance with the October 9, 1980, consent decree, they moved for "enforcement" of that decree by asking the court to release more prisoners. The motion was heard on November 12. The parties stipulated that approximately 1,500 state prisoners remained in county jails, though the consent decree required that none be confined there beyond the previous September 1. On December 14, the court ordered the release of 352 named inmates on December 22. This order differed from the one issued on

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[9]The district court did not actually order that these inmates be released; rather, it directed the Board of Pardons and Paroles to accelerate consideration of their release on parole.

[10]The court did so upon the Department of Corrections' assertion that it had mistakenly included certain prisoners on the lists it had provided of those least deserving of further incarceration.

[11]The day after the district court issued the writs, Alabama Attorney General Graddick, who had not previously been active in this litigation, moved to intervene and requested a stay. On July 17, the Governor, in his capacity as receiver, moved to dismiss the Attorney General's motions. The district court denied the motion to stay on July 22. On July 23, the Attorney General sought a stay in this court, which was denied. That same day the Attorney General filed for a stay in the Supreme Court. On July 25, Circuit Justice Powell denied the Attorney General's motion. The Attorney General then moved the Chief Justice for a stay, and he referred the motion to the entire Court, which denied it on September 2. *Graddick v. Newman*, ____ U.S. ____, 102 S.Ct. 4 (1981). In the meantime, on July 25, the 277 prisoners granted habeas writs were released.

July 15 in three respects. First, the court did not issue writs of habeas corpus.[12] Second, the court placed the releases on parole, subject to the parole authority of Alabama law. Third, the court ordered that all unreleased inmates who would be eligible for parole within six months of the date of its order be considered for parole immediately.

The State moved the district court to stay its December 14 order; the motion was denied. The State then applied to us for a stay, and we granted one pending this appeal. Both the district court's July 15 and December 14 orders are before us.[13]

II.

We first determine that the appeal of the district court's July 15 order should be dismissed as moot. The defendants have fully complied with that order directing release of specifically named inmates and accelerating parole eligibility for others. The July order was not a continuing injunction; it merely required the State to perform certain discrete acts, which it did. No action by this court could change what has been done, and "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 404 (1971).

[12]See note 8, *supra*.

[13]Only the Attorney General appealed the July 15 order; neither the other defendants nor the receiver opposed this first release of prisoners. While there is room to argue that the Attorney General was not a party to this litigation when he appealed the July order, see note 11, *supra*, we accept Justice Rehnquist's guidance that the Attorney General has always been a party to this case, although an inactive one, since his predecessors as Attorneys General were made parties. *Graddick v. Newman*, ___ U.S. ___, 102 S.Ct. 4, 10 (1981) (opinion of Justice Rehnquist). The Attorney General may therefore properly appeal the district court's July 15 order. All of the defendants and the receiver have appealed the district court's December 14 order.

The court faced a similar scenario in *Southern Bell Tel. & Tel. Co. v. United States*, 541 F.2d 1151 (5th Cir. 1976), and determined that "the matter in controversy ha[d] become passe" because the defendants had "complied with all the orders of the District Court and all the orders [had] expired." *Id.* at 1154. It therefore dismissed the appeal as moot. We do likewise with the appeal of the district court's July order.

The appeal of the December 14 order does not suffer the same fate, however. Having granted a stay of that order, we are faced with a live controversy and consider the December order on its merits.[14]

III.

Before discussing the propriety of the December 14 order, we must properly characterize it. All of the parties, and apparently the district court, regarded that order as a means of "enforcing" the October 9, 1980, consent decree. This view was mistaken. The December 14 order was a distinct mandatory injunction in which the court framed relief that was beyond the contemplation of the consent decree: the immediate release of 352 state prisoners. We now explain how we arrive at this conclusion.

The consent decree directs the State to limit the state inmate population of county jails. How the State is to accomplish this is left to the State. If the State seeks to comply with the decree by freeing prisoners, it alone would determine who is to be released and the conditions of release. The plaintiffs, if they think the State is failing to

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[14]That we review the December order on its merits buttresses our decision to dismiss the appeal of the July order as moot, for it demonstrates that the July decree did not present an issue "capable of repetition, yet evading review." *Preiser v. Newkirk*, 422 U.S. 395, 403, 95 S.Ct. 2330, 2335 (1975).

take the action required by the consent decree and wish the court to intervene, have available a traditional equitable remedy. They can initiate contempt proceedings by moving the court to issue an order to show cause why the State should not be held in civil contempt. At the show cause hearing, the State would be entitled to demonstrate that it had complied with the court's decree, or why it should not be adjudged in contempt, or if adjudged in contempt, why sanctions should not be imposed. The State would also have the right to move the court to modify the consent decree.[15]

If the court finds that the State has failed to comply with the consent decree and holds the State in contempt,[16] a variety of sanctions would be available to the court,

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[15]While the State could not attack the validity of the underlying consent decree at a show cause hearing, *AMF Inc. v. International Fiberglass Co.*, 469 F.2d 1063 (1st Cir. 1972), it would of course be free to move the court to *modify* that decree based on changed conditions. A motion to modify could be heard contemporaneously with the show cause order and could bear on the outcome of the contempt hearing.

[16]At oral argument, counsel for the State suggested that an adjudication of contempt would never be appropriate in this case because the State's good faith efforts at compliance with the consent decree would preclude a finding of wilfulness which, according to the State, is a necessary element of civil contempt. The Supreme Court long ago disposed of this contention:

> The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance . . . . Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act.

McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 499 (1949) (citations omitted). *See Louisiana Education Assn. v. Richland Parish School Bd.*, 421 F.Supp. 973, 976 (W.D.La. 1976) *aff'd* 585 F.2d 518 (5th Cir. 1978).

depending on the circumstances. One sanction might be to incarcerate one or more of the defendants, or the receiver. While a federal court is always reluctant to coerce compliance with its decrees by incarcerating a state official, if that official is in contempt there can be no doubt of the court's authority to do so. *See Hutto v. Finney,* 437 U.S. 678, 690, 98 S.Ct. 2565, 2573 (1978). State officials are not above the law.

Another sanction might be to fine the recalcitrant officials. "Civil contempt may . . . be punished by a remedial fine, which compensates the party who won the injunction for the effects of his opponent's noncompliance. . . . If [a state official] refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance." *Id.* at 691, 98 S.Ct. at 2573.

In this case the plaintiffs chose to ignore equity's time-honored contempt procedure in their effort to obtain the State's compliance with the October 9, 1980, decree. They did not seek the imposition of sanctions against the state officials who were charged with reducing the prisoner population in the county jails; instead, they asked the court itself to assume that responsibility and to effect the reduction. The plaintiffs simply moved the court to select the prisoners to be released and to release them. By so moving, the plaintiffs sought new and extraordinary injunctive relief that was beyond the scope of the consent decree.

The court responded by ordering the Department of Corrections to identify several hundred prisoners who were, in the eyes of the Department, most worthy of release. The court then decided who among those identified should be released, ordered the release of 352 prisoners, and directed the Alabama Board of Pardons and Paroles to supervise the releasees as it would prisoners

the Board paroled. None of this relief was provided in the consent decree, either expressly or by implication. Thus, in our view, the district court's order was a discrete mandatory injunction. The question thus becomes whether the district court had before it on December 14 the necessary predicate for a mandatory injunction and, if so, whether the court abused its discretion in fashioning the relief it did.

To be entitled to permanent injunctive relief from a constitutional violation, a plaintiff must first establish the fact of the violation. *Rizzo v. Goode,* 423 U.S. 362, 377, 96 S.Ct. 598, 607 (1976). He must then demonstrate the presence of two elements: continuing irreparable injury, if the injunction does not issue, and the lack of an adequate remedy at law. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 506, 79 S.Ct. 948, 954 (1959). If the plaintiff makes such a showing, the court may grant injunctive relief, but the relief must be no broader than necessary to remedy the constitutional violation. *See Newman v. Alabama,* 559 F.2d 283, 288 (5th Cir. 1977), *cert. denied,* 438 U.S. 915, 98 S.Ct. 3144 (1978). We now test the district court's December 14 injunction against these requirements.

First, the plaintiffs more than adequately established a constitutional violation requiring redress. In *Newman v. Alabama,* 466 F. Supp. at 630, the district court specifically found that the confinement of Alabama inmates in county jails violated the Constitution. That decision was not appealed. Moreover, the October 9, 1980, consent order, which, of course, is binding on the State, recognized the unconstitutional overcrowding in the county jails by specifying measures to alleviate it. Also significant is that the State never moved the district court to modify its findings concerning overcrowding; thus, as the case came

before the district court on December 14, 1981, the fact of unconstitutional overcrowding of state prisoners in county jails could not be disputed.

We conclude, however, that the plaintiffs did not carry their burden of showing the inadequacy of their legal remedy.[17] For the plaintiffs had a complete legal remedy had they only availed themselves of it. The October 9, 1980, consent decree, which set limits on state inmate population in county jails, represented effective relief for the established constitutional violation. Certainly, the plaintiffs must concede that if the State had complied fully with the consent decree, the unconstitutional overcrowding in the county jails would have been remedied. And, as we have earlier recounted, the law provided the plaintiffs a procedure for obtaining full compliance with that decree in the event the State refused to abide by its terms: a civil contempt proceeding and coercive sanctions. Thus, the plaintiffs possessed all the legal relief they could have expected: a consent decree containing a remedy for the constitutional violation and the means for realizing that remedy.

When the plaintiffs sought the injunctive relief the district court gave them on December 14, they made no showing that the State, if adjudged in contempt for violating the consent decree, would not respond to any of the traditional sanctions available to the court to coerce compliance; the court was therefore not presented with a situation in which its contempt power might be ineffec-

[17]In this context, the issues of inadequate legal remedy and irreparable injury are closely related; we thus do not address the irreparable injury element separately.

tual.[18] The plaintiffs plainly were not entitled to a completely new injunction whose issuance depended on a demonstration of inadequate legal remedy, and the district court erred in granting it.

Even if the plaintiffs had established the proper predicate for an injunction, the December 14 order would nevertheless fall since it involved the court in the operation of the State's system of criminal justice to a greater extent than necessary to remedy the constitutional violation. A federal court, when fashioning a remedy to redress constitutional violations in a prison, must recognize that it is ill equipped to involve itself intimately in the administration of the prison system. *Procunier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807 (1974). Deference to prison authorities is especially appropriate when state penal facilities are involved. *Id.*, 94 S.Ct. at 1807.

The district court's December 14 injunction is defective in several respects. First, in determining which prisoners to release, the court utilized its previously ordered lists of inmates that the Department of Corrections believed to be "least deserving of further incarceration." Under Alabama law, however, the Board of Pardons and Paroles, and not the Department of Corrections, determines inmate release eligibility, as well as all other parole policy. In ordering the Department of Corrections to determine which prisoners the court should consider for release, the district court overrode the division of authority between the Department of Corrections and the Board of Pardons and

[18] It could be argued that a conclusion that the court's contempt power is ineffectual cannot be drawn until the court first exercises that power and sanctions fail to produce compliance with the underlying injunctive order.

Paroles, and intruded upon Alabama parole policy.[19] Moreover, by actually naming the prisoners to be released and ordering that their release be subject to Alabama parole authority, the court further usurped the functions of Alabama prison and parole officials, who were reduced to mere functionaries in carrying out the court's commands.

Finally, the court's overreaching, in directing the Board of Pardons and Paroles to supervise the releasees as if they had been paroled under Alabama law and in ordering the Board to accelerate the parole eligibility of unreleased prisoners, becomes even more apparent when we consider that the Board of Pardons and Paroles was not, and is not, a party in this case.

Of course, our conclusion that the provisions of the district court's December injunction were overly broad is only correct if the court could have taken other, less intrusive, action. We find that it could have. We are again drawn to the October 9, 1980, consent decree which sets limits on state inmate population in county jails. This consent order gives the plaintiffs complete relief without unnecessarily entagling the district court in the administra-

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[19]Alabama law of parole provides that:

> No prisoner shall be released on parole merely as a reward for good conduct or efficient performance of duties assigned in prision, but only if the *board of pardons and paroles* is of the opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society.

ALA. CODE tit. 15-22-26 (1975) (emphasis supplied). By ordering the Department of Corrections to submit names of prisoners whom *it believed* worthy of release, the district court directly contradicted Alabama law, which vests all parole authority and discretion in the Board of Pardons and Paroles.

tion of the prison and parole systems; it charges the lawfully constituted Alabama state officials with conforming the jail population to the decreed limits. That this is the proper course cannot be questioned:

> [A] district court in exercising its remedial powers may order a prison's population reduced in order to alleviate unconstitutional conditions, but the details of inmate population reduction should largely be left to prison administrators. This is consistent with the policy of minimum intrusion into the affairs of state prison administration that the Supreme Court has articulated for the federal courts. *See Williams v. Edwards,* 547 F.2d 1206, 1212 (5th Cir. 1977).

Ruiz v. Estelle, 650 F.2d 555, 570-71 (5th Cir. 1981).

The consent decree appears to represent the proper balance between the duty of the district court to remedy constitutional violations and the right of the State to administer its prison and parole systems. More importantly, it places the *responsibility* for operating a constitutional prison system where it belongs: with the State. It is the State that must, and should, make the tough, even agonizing, decisions how to meet the terms of the consent decree. In ordering the release of state inmates, the district court, in effect, relieved the State of its responsibility to follow the law, while at the same time involving itself impermissibly in the operation of the Alabama prison and parole systems.

Our reasoning is informed and supported by the analysis the former Fifth Circuit employed when it reviewed this case in 1977. In *Newman v. Alabama,* 559 F.2d at 288, the court determined that the

> real issue is whether in striving to attain constitutional objectives the District Court in a few

> respects went impermissibly beyond the requirements of the federal constitution; more specifically, did the Court supersede the duly constituted state authorities in the performance of vital state functions rather than *compelling* those authorities to perform those functions in a constitutional manner? We all understand, of course, that federal courts have no authority to address state officials out of office or to fire state employees or to take over the performance of their functions. Most assuredly, however, in proper cases a federal court can, and must, compel state officials or employees to perform their official duties in compliance with the Constitution of the United States.

What was true then remains so now.

In summary, the district court erred in entering the December 14 injunction since the plaintiffs possessed an adequate legal remedy in the form of the October 9, 1980, consent order which was enforceable through the court's contempt power. Even if the issuance of an injunction had been warranted on December 14, the district court abused its discretion by framing relief which was impermissibly intrusive on the State's prerogative to administer its prison and parole systems.

IV

For the reasons stated, we DISMISS the appeal of the district court's July 15, 1981, order as MOOT. The December 14, 1981, order of the district court is VACATED and this cause is REMANDED for proceedings not inconsistent with this opinion.

SO ORDERED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7606

N. H. NEWMAN, et al,
Plaintiffs-Appellees,
UNITED STATES OF AMERICA, et al,
Amicus Curiae,

versus

STATE OF ALABAMA, et al,
Defendants-Appellees,
CHARLES A. GRADDICK,
Attorney General, State of Alabama,
Movant-Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion August 9, 11 Cir., 1982, ____ F.2d ____).
( )

Before MORGAN, TJOFLAT and KRAVITCH, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

N. H. NEWMAN, ET AL;	)	
JERRY LEE PUGH, Etc;	)	
WORLEY JAMES: ET AL,	)	
Plaintiffs,	)	
UNITED STATES OF AMERICA;	)	CIVIL ACTION No. 3501-N
BARRY E. TEAGUE, Etc;	)	
THE NATIONAL PRISON PROJECT,	)	CIVIL ACTION No. 74-57-N
Etc; ET AL,	)	
Amici Curiae,	)	CIVIL ACTION No. 74-203-N
vs.	)	
	)	
STATE OF ALABAMA; ET AL;	)	
LARRY D. BENNETT, Etc; ET AL,	)	
Defendants.	)	

ORDER

These causes are now submitted to the Court on the Receiver's August 28, 1981, request for postponement of consideration of further release of inmates and upon Plaintiffs' September 3, 1981, motion to enforce this Court's October 9, 1980, Order. A hearing was held on November 12, 1981, wherein it was stipulated that on that date there were 1,528 State prisoners confined in city and county jails. The Order of this Court entered herein October 9, 1980, directed that all State prisoners should be removed from city and county jails by September 1, 1981.

Although the federal courts do not sit to supervise State prisons or to interfere with the administration of State institutions, nevertheless, in certain instances the courts must intervene and act to prevent violations of prisoners' fundamental rights. *Adams v. Mathis,* 458 F.Supp. 302 (M.D. Ala. 1978), aff'd. 614 F.2d 42 (5th Cir. 1980); *Nicholson v. Choctaw County, Alabama,* 498 F.Supp. 295 (S.D. Ala. 1980); *McCray v. Bennett,* 467 F.Supp. 187 (M.D. Ala. 1978). Indeed, this Court is under a duty to and will intervene to protect prison inmates from wholesale infringement of their constitutional rights. *Pugh v. Locke,* 406 F.Supp. 318 (M.D. Ala. 1976), aff'd. 559 F.2d 283, cert. den. 438 U.S. 915. See, *Procunier v. Martinez,* 416 U.S. at 405-406; *Johnson v. Avery,* 393 U.S. 483 (1969). Among those rights retained by an inmate is freedom from conditions which constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. This Court has recognized that occasional temporary excesses in the population of a prison facility or jail must occur and may occur without violation of anyone's constitutional rights. However, the continued overcrowding of such facilities for an extended time, when considered in the light of all other circumstances, may constitute a violation of the constitutional rights of those inmates so incarcerated. See, *Newman v. Alabama,* 503 F.2d 1320; *William v. Edwards,* 547 F.2d 1302; *Jones v. Diamond,* 636 F.2d 1364 (5th Cir. 1981) [en banc]; *Rhodes v. Chapman,* ____ U.S. ____, 49 L.W. 4677 (1981).

The Defendant Department of Corrections is under a statutory duty to accept prisoners duly tendered to it for incarceration. However, it has grossly inadequate facilities available for said purpose. It is agreed by all parties that the Alabama Department of Corrections is still out of compliance with the standards established by this Court

in *Newman v. Alabama,* supra, and in *Pugh v. Locke,* supra (see, Consent Decree entered herein October 9, 1980). It is further stipulated by all parties that most of the terms of the said Orders should have been met long before now and that full compliance must ultimately be achieved. Moreover, this Court recognizes that massive and complex problems which have built up over a period of years in the Alabama Prison System cannot be cured overnight. Well-meaning State officials have been given the choice of violating State law or possibly the constitutional rights of certain inmates. Moreover, this Court has attempted to provide every possible opportunity for the Defendants to achieve compliance with both State law and the Orders of this Court within the last nine years.

During this time, the State Department of Corrections has often been in direct violation of the Orders of this Court. On October 9, 1980, this Court ordered that by September 1, 1981, there would be no State inmates incarcerated in city or county jails in Alabama. On November 12, 1981, there were 1,528 State prisoners confined in city and county jails in Alabama. At present, there are over 1,447 State inmates in city and county facilities. As noted by this Court on numerous occasions, if and when the Defendants and or the Receiver cannot or do not meet the requirements of the Constitution as required by the terms of the Orders, this Court will take such action as may be reasonably necessary to protect the rights of prisoners in the Alabama Prison System.

Therefore, because of the failure of those empowered to secure needed construction, this Court has a duty to fashion relief to protect constitutional rights of citizens. *Hutto v. Finney,* 437 U.S. 678, 687. It has been continually noted by this Court throughout the nine years' duration of these cases that, "when a State fails to comply with the

Constitution, the federal courts are compelled to enforce it." *Newman v. Alabama,* 466 F.Supp. 623, 635; *Bibb v. Montgomery County Jail,* M.D. Ala., Civil Action No. 76-380-N. This Court is of the opinion that the constitutional rights of the Plaintiff class are in jeopardy and that any substantial continuation of the incarceration of State inmates in city and county facilities under conditions and circumstances now current would probably violate their constitutional immunity to cruel and unusual punishment. To avoid this result, this Court is of the opinion that the only valid substantial relief available to "insure against the risk of inadequate compliance" (see, *Hutto v. Finney,* supra, at 687) and to help relieve the overcrowded condition of the Alabama Prison System is the release of a substantial number of those inmates who appear to be most likely to assume positions of responsibility and trust outside of prison. For that purpose, this Court will direct the release of the inmates listed in Appendix A hereto. See, generally, *Costello v. Wainwright,* 397 F.Supp. 20 (M.D. Fla., 1975), aff'd. 525 F.2d 1239 (5th Cir. 1976), vacated on rehearing on other grounds 539 F.2d 547 (5th Cir. 1976) [en banc], rev'd. 430 U.S. 525, aff'd. on remand 553 F.2d 506 (5th Cir. 1977). This list is composed of inmates with good conduct records who are approaching normal release dates within six(6) months of the date of this Order (Appendix A). In addition, this Court is of the opinion that the constitutional rights of all Alabama State inmates will best be preserved by this Court's Order directing acceleration of the eligibility date of parole of each inmate who will be eligible for parole consideration any time within six(6) months of the date of this Order.[1] It is the

[1]This opinion should not be construed as ordering the parole of any such inmate. This Court simply recognizes that certain inmates may be deserving of parole and that a parole of one or more of them in less time than is normally required would be a factor in protecting the constitutional rights of inmates remaining incarcerated.

opinion of this Court that, to otherwise construe the law in relation to those named for release or those eligible for accelerated parole consideration, would effect a violation of the constitutional rights of many inmates in the custody of the Alabama Department of Corrections. Therefore, it is

ORDERED, ADJUDGED and DECREED by this Court that on December 22, 1981, the Defendant Department of Corrections for the State of Alabama release from the Alabama Prison System, unless otherwise Ordered, those inmates listed on Appendix A. The placement of these inmates on Appendix A has been made on the basis of criteria acceptable to the Alabama Prison Administrators.[2] Any inmate hereby ordered released shall be released on parole for the balance of his sentence and shall be subject to the general conditions of parole specified in CODE OF ALABAMA, § 15-22-29(b)[1975], and any special conditions which have been, or may hereafter be, prescribed by the Alabama Board of Pardons and Paroles. Nothing contained in this Order shall be construed to prohibit the Alabama Board of Pardons and Paroles from promulgating additional specific conditions of parole with respect to any inmate released under the terms of this Order. In addition, nothing herein shall be construed to affect the otherwise normal functioning of Alabama Pardons and Paroles procedures. It is further

ORDERED by this Court that those inmates who will be eligible for parole consideration any time within six(6) months of the date of this Order be given an accelerated parole eligibility date so as to allow their immediate con-

[2]This statement should not be construed as intimating that any officials of the State of Alabama in any way approves of the terms of this Order.

sideration by the Alabama Board of Pardons and Paroles. It is further

ORDERED by this Court that any inmates listed on Appendix A who are subject to a detainer by the federal government or another State or county, independent of any sentence now being served by said inmate, be released to said detainer subject to all conditions thereof. It is further

ORDERED by this Court that any inmate listed on Appendix A who is presently serving a "split sentence" is hereby released subject to all the conditions of the probation portion of said split sentence. Said probation may be revoked only for cause occurring after the inmate's release from the Alabama Prison System. It is further

ORDERED by this Court that any inmate listed on Appendix A who is under order to pay restitution to his or her victim is hereby released subject to said obligation to pay such restitution and such remedies therefor as may be provided.

DONE this *14th* day of December, 1981.

UNITED STATES DISTRICT JUDGE

NO. 82-1354

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

N. H. NEWMAN, ET AL.,

Petitioners,

UNITED STATES OF AMERICA, ET AL.,

Amicus Curiae,

v.

STATE OF ALABAMA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT CHARLES A. GRADDICK IN OPPOSITION TO THE WRIT

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

N. H. NEWMAN, ET AL.,

Petitioners,

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QUESTION PRESENTED

ARE THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS IN CONFLICT WITH THE DECISION OF THE ELEVENTH CIRCUIT THAT THE DISTRICT COURT WRONGLY DISREGARDED TIME HONORED CONTEMPT PROCEDURE TO ENFORCE A CONSENT DECREE REQUIRING THE REMOVAL OF STATE PRISONERS FROM CITY AND COUNTY JAILS, AND IMPERMISSABLY INTRUDED INTO STATE AFFAIRS BY SELECTING AND RELEASING SEVERAL HUNDRED PRISONERS TO PAROLE STATUS TO CREATE SPACES IN THE ALABAMA PRISON SYSTEM?

PARTIES

The petitioners are N. H. Newman, Jerry Lee Pugh, and Worley James, the named plaintiffs in the courts below for themselves and as representatives of a class composed of all persons presently confined by the Alabama Department of Corrections or who may be so confined in the future.

The respondents are Charles A. Graddick, Attorney General of Alabama; and Fred Smith, Commissioner of the Alabama Department of Corrections. Commissioner Smith was automatically substituted as a party pursuant to Rule 25(d), Federal Rules of Civil Procedure, when he assumed office on January 17, 1983. George C. Wallace, Governor of Alabama, contrary to the assertions of petitioners, is not a party. His predecessor Fob James, was a party to the litigation by choice as Receiver of the Alabama Prison System, not as a party defendant, and Governor Wallace has not assumed the receivership.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

N. H. NEWMAN, ET AL.,

Petitioners,

UNITED STATES OF AMERICA, ET AL.,

Amicus Curiae,

v.

STATE OF ALABAMA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT CHARLES A. GRADDICK IN OPPOSITION TO THE WRIT

DECISIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported at 683 F.2d 1312 (11th Cir. 1982) and a copy is attached to the Petition for

Writ of certiorari as Appendix A.[1] (A.1). The order of the United States District Court for the Middle District of Alabama is not reported and a copy is attached to the Petition for Writ of Certiorari as Appendix C. (A.19).

JURISDICTION

Petitioners have invoked jurisdiction under 28 U.S.C. §1254(1).

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[1]Respondent adopts by reference the Appendix to the Petition for Writ of Certiorari. Respondent will adhere to the Appendix citation form and pagination adopted by petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves Amendment VIII to the Constitution of the United States prohibiting cruel and unusual punishment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

made applicable to the states by Section 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This case also involves Amendment X to the Constitution of the United States which reserves to the state and to the people the right to incarcerate for the public welfare those who have been lawfully convicted of serious crimes:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

STATEMENT OF THE CASE

This litigation which began in 1971 involves three separate lawsuits, now consolidated, brought by inmates under 42 U.S.C. §1983 and 28 U.S.C. §1343(3) to redress constitutional violations in Alabama prisons ranging from inadequate medical care to institutional violence. See Newman v. Alabama, 349 F.Supp. 278 (N.D. Ala. 1972), aff'd, 503 F.2d 1320 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975); Pugh v. Locke, and James v. Wallace, 406 F.Supp. 318 (N.D. Ala. 1976), aff'd with modifications sub nom. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), cert. denied in relevant part, 438 U.S. 781 and 438 U.S. 915 (1978).

The State of Alabama, the Governor of Alabama, and the Alabama Board of Corrections though originally named as defendants, have

been dismissed as parties during the course of the litigation. Alabama v. Pugh, 328 U.S. U.S. 781 (1978); Newman v. Alabama, 559 F.2d at 291-292.

In 1976 the district court in an effort to reduce overcrowding ordered that: "The number of inmates in each institution in the Alabama penal system shall not exceed the designed capacity for that institution." Pugh v. Locke and James v. Wallace, 406 F.Supp. at 332. Yet during the period from 1976 to the present Alabama, like every other state, experienced an unprecedented rise in the number of persons sentenced to prison. This increase combined with the court imposed limitation on prison population resulted in a backlog of state prisoners in city and county jails throughout Alabama. Newman v. Alabama, 466 F.Supp. 628, 630 (N.D. Ala. 1979).

Faced with continuing problems in the Alabama prison system and a backlog of state prisoners in city and county jails, Fob James, after assuming the office of Governor of Alabama on January 17, 1979, requested the district court to appoint him Receiver of the Alabama prison system. The district court granted his request, appointed him Receiver, and charged him with bringing the system in conformity with the court's decrees. Newman v. Alabama, 466 F.Supp. at 636.

Some 20 months later on October 9, 1980, the district court approved and signed a consent decree in which Receiver James and Joe Hopper, Commissioner of the Alabama Department of Corrections, agreed to reduce periodically the number of state prisoners in city and county jails until September 1, 1981, when none were to remain.

But the State of Alabama in 1981 experienced a 24.8% increase in its prison population, the largest in its history and the largest percentage increase of all the states for 1981. See Bureau of Justice Statistics Bulletin, "Prisoners in 1981" (May, 1982). So rather than steadily decreasing as the consent decree required, the population of state inmates in city and county jails actually increased throughout the early months of 1981. (A.4).

The petitioners took no steps to compel compliance with the consent decree. (A.4). They did not move the district court to order the Receiver and the Commissioner to show cause why they should not be held in civil contempt for violating the decree. (A.4).

Rather, on March 9, 1981, petitioners filed a "Motion to Require the Provision of Sufficient Funds for Compliance with the October 9, 1980, [consent] Order or the Release

of Members of the Plaintiff Class Until There is Compliance." (A.4). The motion asked the district court to direct the state to provide funds sufficient to build new prison facilities that would alleviate the overcrowding in county jails. (A.4). Alternatively, the motion requested the release from state custody of 200 prisoners a week until no state prisoners remained in county jails. (A.4).

A hearing was held on May 18, 1981, on petitioners' motion at which it was stipulated that the overcrowding of state prisoners in county jails had not abated. (A.4). The petitioners abandoned their request for prison construction funds[2] and asked the court

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[2]As of May 2, 1981, one new prison was under construction, two additional new prisons were planned (they are now under construction), and additional construction and renovations were underway to add additional spaces to existing facilities.

for immediate relief from the overcrowding. (A.4).

On May 20, 1981, the district court ordered the Department of Corrections to submit to the court a list of 250 prisoners "least deserving of further incarceration", and additional lists, each with the names of 250 prisoners, every two weeks for a period of eight weeks.[3] (A.5).

Then, on July 15, 1981, the district court in a written order named 400 inmates to be released; ordered that on July 24, writs of habeas corpus issue for these prisoners; and accelerated the parole eligibility dates of 50 others. (A.5-6). On

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[3]The record does not so reflect but the Department of Corrections undoubtedly complied with this order, at least in part.

July 22, the court amended its July 15 order by reducing the number of inmates to be released on habeas corpus to 277. (A.6). Receiver James and the Commissioner released the designated prisoners, (A.6), over objection of the Attorney General.[4]

Despite the release of 277 prisoners, the plaintiffs remained dissatisfied with the overcrowded conditions of the city and county jails, and again, rather than seeking to compel the Receiver and the Commissioner to comply with the October 9, 1980, consent

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[4]The Attorney General sought to stay the release of these prisoners but a stay was denied by the district court, the Eleventh Circuit Court of Appeals and this Court. Graddick v. Newman, 453 U.S. 928 (1981). The Attorney General appealed the release of these 277 prisoners to the Eleventh Circuit Court of Appeals, but the Court of Appeals treated the matter as moot. (A.7). The July 15 order is not before this Court on petition for writ of certiorari.

decree, they moved the district court to release more prisoners. (A.6). This motion was heard on November 12, 1981, when it was stipulated that approximately 1500 state prisoners remained in city and county jails.[5] (A.6).

On December 14, 1981, the district court ordered the release of 352 named inmates; they were to be released December 22, 1981. (A.6). This order differed from the

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[5]There were 1800 state prisoners in city and county jails in September, 1978. Newman v. Alabama, 466 F.Supp. at 630. It was stipulated at the hearing on May 18, 1981 preceeding the first release that there were 1606 state prisoners confined in city and county jails. Newman v. Alabama, No. 3501-N (M.D. Ala., order entered July 15, 1981). As of the recent compliance hearing held January 3, 1983, there were approximately 1200 and none had been there more than one year except those prisoners who had jobs in the jails and wished to remain. Id. Testimony of Joe Hopper January 4, 1983.

one previously issued on July 15, 1981, in three respects: first, the court did not issue writs of habeas corpus; second, the court placed the releasees on parole, subject to the parole authority of Alabama law; and and third, the court ordered that all unreleased inmates who would be eligible for parole within six months of the date of its order be considered for parole immediately. (A.6-7).

The Attorney General, and this time also the Governor and the Commissioner, objected to the release of these prisoners and moved the district court to stay the release pending appeal; their motion was denied. (A.7). They then applied to the Eleventh Circuit Court of Appeals for a stay pending appeal, which was granted. (A.7).

An appeal was taken to the Eleventh Circuit Court of Appeals, and on August 9, 1982, the Court of Appeals vacated the

the district court's order releasing the prisoners and remanded the case for further proceedings.

The Court of Appeals held (1) that the petitioners had made no showing that the Receiver and the Commissioner, if adjudged in contempt for violating the consent decree, would not respond to any of the traditional sanctions available to the court to coerce compliance; (2) that the plaintiffs were not entitled to a completely new injunction whose issuance depended on a demonstration of inadequate legal remedy; and (3) that the district court erred in granting it. (A.12-13).

The Court of Appeals further held that even if the issuance of an injunction had been warranted, the district court abused its discretion by framing relief which unnecessarily involved the court in the state's

criminal justice system; overrode the division of authority between the Alabama Department of Corrections and the Board of Pardons and Parole; intruded upon Alabama's parole policy; and reduced prison and parole officials to mere functionaries in carrying out the court's commands. (A.13-14).

Petitioners sought a rehearing en banc. The Court of Appeals denied their petition for rehearing on October 19, 1982. On December 29, 1982, Justice Powell extended the time for filing a petition for writ of certiorari to and including February 14, 1983. Petitioners filed a petition for writ of certiorari on February 14, 1983.

SUMMARY OF ARGUMENT

The backlog of state prisoners in city and county jails in Alabama has been caused by the latest impact of a social phenomenon that has affected this country since the early '50's. Alabama, like every state that has felt the impact of this phenomenon in its prisons in the last ten years, has staggered under the burden of housing ever increasing numbers of criminals brought to justice and sentenced to prison terms. Efforts by the Legislature of Alabama to meet the problem have only been overwhelmed by subsequent waves of sentenced prisoners, often with longer sentences because they have been caught repeatedly and the people of Alabama now seek only to incapacitate them, rehabilitation having failed.

Receiver James and Commissioner Hopper in agreement with the petitioners and the

district court sought to solve this problem by releasing prisoners who had already served some time. The court on motion of the petitioners further sought to insulate the Receiver and the Commissioner from this distasteful and unpopular action out of delicacy to their position. In so doing the court erred. The court entered an injunction directing the release of prisoners when the petitioners already possessed an adequate legal remedy in the form of the October 9, 1980, consent order enforceable through the court's contempt power, and abused its discretion by framing relief which was impermissibly intrusive on the state's prerogative to administer its prison and parole systems.

ARGUMENT

The problems that have beset the Alabama prisons including the backlog of state inmates in the city and county jails are but the predictable result of the coming of age of the baby-boom generation, only now it is crowding prisons instead of maternity wards and schools.[6] Crime is almost as age-specific as driving, diapers, and dentures. Teenagers and young adults dominate crimes of violence and crimes of property. Nearly one-half of all the people arrested in this country are between the ages of 14 and 24. In 1960, the 14-24 age group included only fifteen percent of the population but accounted for sixty-nine percent of all arrests for serious crimes.

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[6]For a thorough and altogether enlightening analysis of the impact of the baby-boom generation on American society see Jones, Great Expectations: America and the Baby-Boom Generation (Ballantine Ed. 1980). Chapter 11 of this book is devoted to the crime boom and the information which follows concerning the impact of this generation on crime in America is taken from this chapter.

Compared to those 25 and over, the younger age group commits twice as many murders, five times as many forcible rapes, six times as many robberies, nine times as many larcenies, ten times as many burglaries, and twenty times as many car thefts. The peak age of violent crime in the United States is 18; auto thieves and burglars are 16; murderers are 20.

After 1960 millions of baby-boom children began flooding into the most crime-prone ages in society. In ten years the 14-24 cohort grew by more than fifty percent and thirteen million people, a larger increase than in the rest of the century before it. Its growth rate was six times the increase of all other age groups combined. Just as an increase in babies would mean a proportionate increase in the market for pacifiers, any increase in a social group with greater-than-average propensity for committing crime would yield a proportionate increase in the incidence of crime itself.

This is exactly what happened in the '60's and early '70's. The impact on the prisons, came slightly later. Since the early '60's criminal justice has been largely committed to rehabilitating young offenders. Those of the baby-boom generation who chose to commit crimes for the most part were not sent to prison when they were first caught. It is only since around 1976 when the prisons across the nation first began to experience substantial increases in the prison population that they have begun to be sentenced to prison terms for subsequent offenses.

The Alabama prison system, like the prison systems of its sister states, has been overwhelmed.

Mass release of prisoners by federal courts, however, is not the answer.

If there is not enough room in our prisons for all the criminals who should be there, then hard choices will have to be

made. If we must resort to selective incarceration to assure that at the very least we lock up the most dangerous, we must. But those who decide who is to be locked up and who is to be placed in alternative programs must be politically accountable, there is no acceptable margin for error or negligence. The district court should not have insulated Receiver James and Commissioner Hopper from the consequences of their actions. But the court did. And in so doing the court erred.

Though petitioners cite a number of cases as authority supporting the district court's action, only one, Hutto v. Finney, 437 U.S. 678 (1978), concerned prison conditions, and that case did not involve overcrowding or the release of prisoners. The cases petitioners cite, to the extent that they can be made applicable to this case, stand only for the proposition that the

district court's equitable powers are broad.[7] This is not disputed.

The problem, as the Court of Appeals has implicitly recognized, is that the district court's equitable powers are subject to certain established principals.

First, the nature of the remedy is to be determined by the nature and scope of the constitutional violation, and the remedy must, therefore, be related to the condition alleged to offend the Constitution. Second, the decree must be remedial in nature and designed as nearly as possible to restore victims to the position they would have occupied in the absence of the constitutional

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[7]The one exception is Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II) which petitioners discuss on page 8 of their petition for writ of certiorari. In addition to being authority for the proposition that the district court's equitable powers are broad, Milliken II sets out the principals which limit the district court's exercise of its equitable powers. See discussion in text at 23.

violation. Third, federal courts in formulating a remedy must take into account the interest of state and local authorities in managing their own affairs consistent with the Constitution. Milliken v. Bradley, 433 U.S. 267, 280-81 (1977) (Milliken II).

The district court never ascertained the existence of current constitutional violations from overcrowding in the city and county jails.[8] Nor did the district court ascertain whether the Alabama statutes on pardons and paroles, as written or applied, caused or contributed to unconstitutional

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[8]The district judge since being assigned the case on July 17, 1979, has not conducted evidentiary hearings or otherwise heard evidence regarding the conditions of confinement of state inmates in city and county jails.

overcrowding.[9]

Rather, the district court framed its release order in terms of "possible" constitutional violations:

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[9]Section 15-22-26 of the Alabama Code provides:

> No prisoner shall be released on parole merely as a reward for good conduct or efficience performance of duties assigned in prison, but only if the board of pardons and paroles is of the opinion that there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society.

Section 15-22-28(e) of the Alabama Code provides:

> The board shall not grant a parole to any prisoner who has not served at least one-third or ten years of his sentence, whichever is the lesser, except by a unanimous affirmative vote of the board.

> "This court is of the opinion that the constitutional rights of the plaintiff class are in jeopardy and that any substantial continuation of the incarceration of state inmates in the city and county jails would probably violate their constitutional immunity to cruel and unusual punishment." (Emphasis added.) (A. 22).

Absent an existing constitutional violation,[10] the district court was without authority to fashion a remedy, particularly one as extraordinary as the premature release of convicted criminals. Rhodes v. Chapman 452 U.S. 337, 349-50 (1981).

Morever, even if the district court had properly ascertained the existence of a current constitutional violation, the

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[10]Even if the conditions of confinement of state inmates in city and county jails were to rise to the level of cruel and unusual punishment on a long term basis, such conditions of confinement would not necessarily constitute cruel and unusual punishment on a temporary incarceration basis. Cf. Hutto v. Finney, 437 U.S. 678 (1978) (length of confinement in punitive isolation considered relevant in determining whether the confinement constituted cruel and unusual punishment).

district court would not have had the authority to order the release of prisoners under §1983. Prieser v. Rodrigues, 411 U.S. 475, 499-500 (1973). The prisoners selected for release by the district court were lawfully convicted and lawfully sentenced by the state courts of Alabama. They had no underlying right to release then, and they have none now. The position they and all other members of the plaintiff class occupy in the absence of any constitutional violation is incarceration.

The remedy to which petitioners were entitled, if any, was an injunction requiring the removal of state prisoners from the city and county jails. Cook v. Hanberry, 596 F.2d 658, 660 (5th Cir. 1979). This they already had in the form of the October 9, 1980, consent order. (A.8-9).

If the petitioners were unsatisfied with the removal of state inmates from the city and county jails they had available a

traditional equitable remedy in the form of a contempt proceeding which they could have initiated by moving the court to issue an order to the Receiver and the Commissioner directing them to show cause why they should not be held in civil contempt for failure to reduce the state prisoner population in city and county jails as required by the October 9, 1980, consent order. (A.9).

At the show cause hearing the Receiver and the Commissioner would have been entitled to demonstrate that they had complied with the consent order, or why they should not be adjudged in contempt, or if adjudged in contempt, why sanctions should not be imposed. (A.9). They would also have had the right to move the court to modify the consent order.[11] (A.9).

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[11]Changed circumstances such as an unprecedented increase in criminals brought to justice and sentenced to prison terms which make the timetables established in the October 9, 1980, order not reasonably achievable despite good faith effort would be grounds for modification. Nelson v. Collins, 659 F.2d 420 (4th Cir. 1981).

When the petitioners sought the release of prisoners they made no showing that the Receiver or the Commissioner, if adjudged in contempt for violating the consent order, would not respond to any of the traditional sanctions available to the court to coerce compliance. (A.12). The district court was therefore not presented with a situation in which its contempt power might be ineffectual. (A.12-13). The petitioners also made no showing that members of the plaintiff class would suffer a continuing irreparable injury if prisoners were not immediately released[12] or that they had no adequate remedy at law, both of which are essential predicates for any new mandatory injunction like that which the district court issued. (A.11-12).

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[12]For the district court to have addressed the question of continuing irreparable injury it would have been necessary to inquire into the existing conditions of confinement in each and every county jail. See Stewart v. Winter, 669 F.2d 328 (5th Cir. 1982) F.2d 328 (5th Cir. 1982).

CONCLUSION

The decisions of this Court and other courts of appeals are not in conflict with the decision of the Eleventh Circuit vacating the district court's order releasing prisoners. The district court had neither the authority to release prisoners under §1983, nor the necessary basis for an entirely new mandatory injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served two copies of the foregoing Brief of Respondent in Opposition to the Writ of Certiorari on the following attorneys by placing same in the United States mail, postage prepaid and addressed as follows:

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DONE this the _____day of March, 1983.

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